Supreme Court, U.S.
FILED

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Docket No.

IN THE

**SUPREME COURT OF THE UNITED STATES**

**JIMMY SCOTT BAGLEY,**
*Petitioner*

v.

**CITY OF ATLANTA, ET AL.,**

On Petition For Writ of Certiorari
To The United States Court of Appeals For the
Eleventh Circuit

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I. Whether seven written citizen complaints filed against defendant police officer Wingo, two of which for excessive force were sustained prior to the assault upon Petitioner, constitute notice to the City of Atlanta and its Chief of Police, of Wingo's propensity for violence when making arrests.

II. Whether seven written citizen complaints filed against defendant police officer Wingo, two of which for excessive force were sustained prior to the assault upon Petitioner, constitute evidence that City of Atlanta has a custom of inadequately supervising and disciplining its police officers for, or tolerating the use of excessive force.

III. Whether *Brooks v. Schieb*, 813 F.2d 1191 (1987), relied upon by the District Court and the Eleventh Circuit Court of Appeals, directly conflicts with prevailing precedent in the First, Second, Third, Fifth, and Ninth Circuits best exemplified by *Beck v. City of Pittsburgh*, 89 F.3d 966 (1996), such that Petitioner would have prevailed on Defendants' Motion for Summary Judgment in the lower courts of such Circuits, where the filing of seven citizen complaints, two of which for excessive force were sustained prior to the assault on Petitioner, would have constituted evidence of knowledge, custom or policy on the part of the City, and precluded summary judgment.

IV. Whether the panel erred in holding (without citation of controlling precedent) that the prior citizen complaints against Defendant Wingo were "simply allegations" and "too speculative" to support Petitioner's claim, when at least two such prior complaints were sustained.

## CERTIFICATE OF INTERESTED PERSONS

Counsel hereby certifies that the following are persons having an interest in this matter:

**THE HONORABLE CHARLES A. MOYE, JR.**, Judge, United States District Court, Northern District of Georgia;

**JIMMY SCOTT BAGLEY**, Plaintiff (1:96-CV-151-CAM)

**RICHARD A. GORDON**, Attorney for Plaintiff/Petitioner Bagley;

**J. G. WINGO**, Individually and as a police officer of the City of Atlanta, Georgia, Defendant/Respondent;

**B. S. DAWKINS**, Individually and as a police officer of the City of Atlanta, Georgia, Defendant/Respondent;

**BEVERLY HARVARD**, as Chief of Police of the City of Atlanta, Georgia, Defendant/Respondent;

**CITY OF ATLANTA, GEORGIA**; Defendant/Respondent;

**SUSAN PEASE LANGFORD, CITY ATTORNEY**, Attorney for Defendants/Respondents;

**KIMBERLY L. MILLER, ASSOCIATE CITY ATTORNEY**, Attorney for Defendants/Respondents.

## TABLE OF CONTENTS and TABLE OF CITATIONS


Questions Presented for Review.....(i)
Certificate of Interested Persons .....(ii)
Table of Contents ..... (iii)
Table of Cited Authorities.....(iii-iv)
Citations of Reports.....(iv)
Statement of Jurisdiction.....1.
Constitution & Statutory Citations..... 1.
Statement of the Case..... 2.
(I) Proceedings and Disposition..... 2.
(II) Basis for Federal Jurisdiction..... 2.
(III) Statement of Facts..... 3.
Argument and Citations of Authority.....7.
Conclusion ..... 17.
Certificate of Service .....Filed separately.


### AUTHORITIES CITED

**Cases**


1. *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978);

2. *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989);

3. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d (1986);

4. *Brooks v. Scheib*, 813 F.2d 1191 (11th Cir. 1987);

5. *Beck v. City of Pittsburgh*, 89 F.3d 966 (3rd Cir. 1996), *cert. denied*, 519 U.S. 1151, 117 S.Ct. 1086, 137 L.Ed.2d 219 (1997);

6. *Montiel v. City of Los Angeles*, 2 F.3d 335 (9th Cir. 1993);

7. *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987), *cert. denied*, 484 U.S. 1027, 108 S.Ct. 752, 98 L.Ed.2d 765 (1988);
8. *Owens v. City of Atlanta*, 780 F.2d 1564, 1567 (11th Cir. 1986);

9. *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1442 (11th Cir. 1985);

10. *Cannon v. Taylor*, 782 F.2d 947, 951 (11th Cir. 1986);

11. *Turpin v. Mailet*, 619 F.2d 196 (2d Cir. 1980), *cert. denied*, 449 U.S. 1016, 101 S.Ct. 577, 66 L.Ed.2d 475 (1980);

12. *Fletcher v. O'Donnell*, 867 F.2d 791, 793 (3d. Cir 1989), *cert. denied*, 492 U.S. 919, 109 S.Ct. 3244, 106 L.Ed.2d 591 (1989);

13. *Vann c. City of New York*, 72 F.3d 1040, at 1049 (2d Cir.1995);

14. *Henry v. County of Shasta*, 132 F.3d 512 (9th Cir. 1997);

15. *Foley v. City of Lowell*, 948 F.2d 10 (1st Cir. 1991);

16. *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991);

17. Grandstaff v. City of Borger, 767 F.2d 161 (5th Cir. 1985).

**Statutes & Reports**

42 U.S.C. § 1983..... (Text set out in the Appendix)
28 U.S.C. § 1343..... (Text set out in the Appendix)
U.S. Constitution Amendments I, IV, V, XIV
(Text set out in Appendix)

## STATEMENT OF JURISDICTION

Pursuant to Supreme Court Rule 10, Petitioner respectfully requests that a writ of certiorari be granted because the United States Court of Appeals for the Eleventh Circuit has entered its decision in this case pursuant to *Brooks v. Scheib*, 813 F.2d 1191 (11th Cir. 1987) which directly conflicts with prevailing precedent in the First, Second, Third, Fifth, and Ninth Circuits, best exemplified by the decision of the United States Court of Appeals for the Third Circuit in *Beck v. City of Pittsburgh*, 89 F.3d 966 (3rd Cir. 1996), *cert. denied*, 519 U.S. 1151, 117 S.Ct. 1086, 137 L.Ed.2d 219 (1997). These two cases, and the respective Circuit Courts are in direct conflict in the interpretation and application of this Court's decision in *Monell v. New York Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); specifically as to whether numerous citizen complaints filed with city police officials regarding an individual officer's repeated use of excessive force is sufficient to present a question of fact as to knowledge of such conduct on the part of the municipality, or its having adopted a policy or custom of tolerating the use of excessive force, for purposes of liability under 42 U.S.C.A. §1983.

## CONSTITUTIONAL PROVISIONS & STATUTES

42 U.S.C. § 1983..... (Text set out in the Appendix)
28 U.S.C. § 1343..... (Text set out in the Appendix)
U.S. Constitution Amendments I, IV, V, XIV

The text of the cited Amendments to the United States Constitution is set out in the Appendix to this Petition.

## STATEMENT OF THE CASE

### PROCEEDINGS AND DISPOSITION

The action below was one for violations of civil rights pursuant to 42 U.S.C.A. § 1983 and for deprivation of rights, secured by the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States of America. The District Court had jurisdiction of the case pursuant to 28 U.S.C.A. § 1343.

The City of Atlanta and other Defendants filed a Motion for Summary Judgment. Appellants responded, citing seven written citizen complaints concerning use of excessive force, abusive and rude behavior by Wingo; two of which for excessive force were sustained prior to the assault by Wingo upon Plaintiff-Petitioner Bagley. In an order dated September 14, 1999 [R. 68] the District Court denied summary judgment as to Wingo and denied summary judgment to Harvard, Dawkins and the City on claims of "excessive force" and found that there was sufficient evidence to show that there were genuine issues of material fact as to the Defendants' knowledge of Wingo's propensity to use excessive force. The City moved for reconsideration. On reconsideration, the District Court's Order dated and entered November 2, 1999 [R. 72], reversed certain findings of fact and conclusions of law set forth in the decision of September 14, and granted summary judgment to Defendants Dawkins, Harvard and The City of Atlanta on all counts under Rule 56(c) of the Federal Rules of Civil Procedure.

On December 28, 2000, the panel decision of the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's Order but failed to cite any case law, statute or other controlling precedent in holding that the "evidence regarding the citizen complaints was too speculative to support Bagley's claim".

On March 22, 2001, the Petition for Rehearing and

Petition for Rehearing En Banc were denied by the United States Court of Appeals for the Eleventh Circuit, despite the disparity between the circuits regarding the evidentiary value of numerous prior citizen complaints.

On June 20, 2001, Petitioner filed the within Petition for Writ of Certiorari contending that Wingo's extensive history of civilian complaints was sufficient to put his supervisors and the City on notice of his propensity for violence and abuse toward citizens, or evidence of the failure of Defendants Dawkins, Harvard and City of Atlanta to adequately train and supervise Wingo, or dismiss or effectively discipline Wingo; or evidence of a policy or custom of tolerating such conduct.

## STATEMENT OF THE FACTS

When taken in the light most favorable to Petitioner, Jimmy Scott Bagley, the relevant facts are as follows: While John Nesbitt, Mrs. Nesbitt, and Andrew Martin were leaving the Midtown Music Festival in Atlanta, Georgia on May 15, 1994, Defendant, James Wingo, a City of Atlanta police officer, approached their party, and without provocation became verbally abusive, telling them to "go the fuck the other way" and "go the fuck with the other people." As the Nesbitt party was leaving the area, Defendant Wingo attacked Mr. Nesbitt from behind, and while Mr. Nesbitt held his hands in the air saying: "I'm not resisting", Defendant Wingo threw him around, into the side of a nearby car and onto the ground. When Andrew Martin complained about the treatment of his friend, Defendant Wingo directed that Mr. Martin be arrested.

Petitioner Bagley was totally unacquainted with the Nesbitts or Mr. Martin prior to the incidents forming the basis of within proceedings; and happened to be also in attendance at the Midtown Music Festival with a friend and their dates. After witnessing the treatment of Mr. Nesbitt at the hands of Defendant, Wingo, Petitioner Bagley offered his name and

phone number to Mrs. Nesbitt, and volunteered to be a witness concerning Defendant Wingo's use of excessive force. While Petitioner Bagley was speaking to Mrs. Nesbit some distance away, and with his back to Defendant Wingo, another officer came on the scene.

Defendant Wingo left the Nesbitt and Martin arrests, and without provocation or justification attacked Petitioner Bagley from behind, grabbed him by the head, threw him into the side of a truck parked nearby, with such force as to break the sideview mirror, threw him to the ground, kneeled on his neck, got right next to his head while it was pinned to the ground, and challenged him with: "You want a piece of me?"

Defendant Wingo then directed that Petitioner Bagley be arrested, and charged him with obstruction of an officer and disorderly conduct. As a result of this unprovoked assault, Petitioner Bagley suffered serious and permanent injury to his neck and back.

All of the charges cited by Defendant Wingo against Mr. Martin were dismissed at committal hearing by the Municipal Court. All of the charges cited by Defendant Wingo against Petitioner Bagley were dismissed by the Solicitor of the State Court. All of the charges cited by Defendant Wingo against Mr.Nesbitt were dismissed by the State Court when Wingo failed to appear for trial after being subpoenaed.

Mr. Nesbitt filed a complaint with the Office of Professional Standards (O.P.S.; Internal Affairs). The Officer who took Mr. Nesbitt's complaint refused the offer of names and addresses of independent witnesses saying someone would call for them later. The case was assigned to Sargent Dawkins, Officer Wingo's supervisor. Sgt Dawkins had also approved Defendant Wingo's work permit for the day in question, and had approved Wingo's report given in support of his arrests of Nesbit, Martin and Bagley.

According to written policy in the Atlanta Police

Department disciplinary manual [R. 57, Ex. 3], this complaint should have been handled by an officer in OPS. Dawkins never contacted the independent witnesses, never called to interview Mr. Nesbitt, never called to interview Mrs. Nesbitt, never called to interview Mr. Bagley, and never called the physician who had treated and evaluated Mr. Nesbitt's injuries. Dawkins never even interviewed Defendant Wingo, but accepted as true, every statement in Wingo's report, even though Wingo's disciplinary history included at least one prior SUSTAINED incident of filing a PERJURIOUS report denying the use of excessive force.[R. 59].

There was more than ample evidence in Defendant Wingo's disciplinary file to place Chief Harvard and the City of Atlanta on notice of a long string of citizen complaints against Defendant Wingo, several involving complaints of abusive language and violent behavior, as well as TWO PRIOR SUSTAINED complaints resulting from excessive use of force in effecting arrests. Prior to the incident giving rise to the within proceedings, **two lawsuits** had been filed against Defendant Wingo and the City of Atlanta. These suits alleged excessive force and were **settled with payments to the Plaintiffs by the City of Atlanta.** [R. 63].

One of those complainants, OTIS LETT, filed a complaint in September 1990. The investigative file of that complaint is contained in Petitioner's Exhibit #35 [R. 59][1]. Mr. Lett complained that Wingo attacked him and struck him in the head while he had his hands in the air in a posture of surrender and kicked him while he lay defenseless on the ground. This complaint was sustained. It was in connection with this Complaint that Defendant Wingo filed a written response under oath, claiming that Mr. Lett had injured

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1. According to the record in Case No. 96:CV00151, all of the citizen complaints filed against Officer Wingo are grouped together in Volume 4, Tab 59.

himself while falling to the pavement. The treating physician observed that Mr. Lett's injuries could not have occurred as claimed by Wingo. [Plaintiff's Exhibit #35, R. 59].

Plaintiffs' Exhibit #36 [R. 59] is the investigative file of the citizen complaint of Chester Kelly, also of September 1990, just one week after the Lett incident. Mr. Kelly complained that Wingo struck him in the head and kicked him without provocation in the course of an arrest arising out of a domestic dispute. Of particular note is the fact that the family member originally calling the police for assistance, was compelled to call the Atlanta Police Department for a supervisor to come to the scene to halt the violence being visited upon the arrestee by Defendant Wingo. Wingo received a one day suspension for his actions in connection with the Kelly Complaint.

Plaintiffs' Exhibit #38 [R. 59] also includes the investigative file of the complaint of Daphne Delaney in November of 1993. Ms. Delaney made a sworn complaint that after nearly trampling her with his horse, Wingo not only did not apologize but became verbally abusive and frightened her. This Complaint resulted in Defendant Wingo being "verbally counselled" for proper courtesy in dealing with citizens."

On April 1, 1995, Torrence Tillman, Rasvida Davis, James Bodie, and several others reported to the Atlanta Police Department that Defendant Wingo had attacked and hit Walter Lee Butler Jr. on the head with a nightstick while on horseback simply because Butler complained from across the street about Wingo's treatment of other persons. [R. 59]. According to all witnesses, Defendant Wingo (as in this case,) left the scene of one arrest, rode across the street, pinned Mr. Butler against a stone wall with his horse, beat Mr. Butler about the head with a baton, and cited and arrested Mr. Butler for obstruction. Co-defendants Dawkins and Harvard were involved in the investigation of this Complaint. In spite of the unequivocal testimony of six independent witnesses,

including an attorney, Co-defendant Dawkins credited only the testimony of Defendant Wingo, and ignored the statements of all others, in finding the Complaint "unsubstantiated".

Defendants have admitted to the authentication of the OPS investigative files and Defendant Wingo's disciplinary file. These documents were available to the Chief of Police, OPS, and each successive citizen complaint investigator.

## ARGUMENT AND CITATION OF AUTHORITY

I. The seven written citizen complaints filed against defendant police officer Wingo constitute notice to the City of Atlanta and its Chief of Police, of Officer Wingo's propensity for violence when making arrests. The perfunctory treatment of such complaints, and the failure to reassign Wingo, or terminate Wingo's employment constitute evidence that there was an adopted or *defacto* policy, or "custom" of tolerating incidents of abuse, and engaging in perfunctory investigations of citizen complaints.

In addressing what a plaintiff must prove in alleging a violation of 42 U.S.C. §1983, this Court held in *Monell v. New York Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) that a plaintiff must show that the complained action "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or else is "visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels." *Monell*, 436 U.S. at 690-691, 98 S.Ct. at 2035-2036. "Thus, although the municipality may not be held liable for a constitutional tort under 42 U.S.C. §1983 on the theory of vicarious liability, it can be held responsible when the injury inflicted is permitted under its

adopted policy or custom".[2]

The Court's reasoning in *Monell* has created two separate paths to establish municipal liability under 42 U.S.C. § 1983, depending on whether the allegation is based on municipal policy or custom.[3] In *Pembaur v. Cincinnati*, 475 U.S. 469 at 480-81 (1986), municipal liability was based on a single act of a municipal policy maker and was fairly easy to determine. However, municipal liability based on "custom" is much more difficult to ascertain.

This Court established the rule for establishing the liability of a municipality according to custom, in *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). "It is only when the 'execution of the government's policy or custom...inflicts the injury' that the municipality may be liable under §1983." *Id*, 489 U.S. at 385. This Court specifically held that, "[t]he inadequacy of police training may serve as a basis for §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id*, 489 U.S. at 388.

To establish liability under *Monell*, it has been held that evidence of prior complaints against officers is effective. *See Montiel v. City of Los Angeles*, 2 F.3d 335, 343 (9th Cir.1993)(reversing summary judgment for the City because the investigation of plaintiff's complaint- which was "shallow and deficient", plus three prior citizen complaints against defendant officer, plaintiff "might very well have [been] enough evidence against the City to withstand the motion");

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2. *Beck v. City of Pittsburgh*, 89 F.3d at 971 (1996), *cert. denied*, 519 U.S. 1151, 117 S.Ct. 1086, 137 L.Ed.2d 219 (1997).

3. See *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481, 106 S.Ct. 1292, 1299, 89 L.Ed.2d (1986).

*Spell v. McDaniel*, 824 F.2d 1380, 1388 (4th Cir. 1987), cert. denied, 484 U.S. 1027, 108 S.Ct. 752, 98 L.Ed.2d 765 (1988) (department complaint records corroborated specific testimony about prior misconduct).

Despite possible evidentiary problems with admissibility relating to the complaint data, the District Court ruled in this case that the seven citizen complaints are admissible. [Order R.68, p. 22]. In the District Court's Order [R.68] the Court outlined the seven complaints against Officer Wingo from 1990 to 1995. Five of the seven involved complaints of excessive force relating to Officer Wingo's beating citizens on and around the head and neck, similar to the beating Petitioner Bagley suffered in 1994. [R.59]. The District Court initially held that the number and manner of the citizen complaints against Officer Wingo created a triable issue of fact against Chief Harvard, Sgt. Dawkins, and the City of Atlanta. However, relying on *Brooks*, the District Court later reversed its September 14, 1999 Order denying summary judgment, and, erroneously concluded that "the complaints were 'not sustained'," and that they were "insufficient to put Chief Harvard, Sgt. Dawkins, and the City on notice of Officer Wingo's alleged tendency to use excessive force." [R. 72].

II. The United States Court of Appeals for the Eleventh Circuit affirmed the District Court's decision in this case pursuant to *Brooks v. Scheib*, 813 F.2d 1191 (11th Cir. 1987). The Eleventh Circuit in *Brooks*, interpreted this Court's decision in *Monell v. New York Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) as follows:

"Monell holds that a municipality shall be liable under 42 U.S.C. §1983 if a 'custom' or 'policy' of the city is the 'moving force' behind a constitutional violation. *Id.* at 690-694, 98 S.Ct. at 2035-38. Our circuit has interpreted *Monell* as requiring that '[t]he municipality itself must be at fault in some sense for establishing or maintaining the policy which

causes the injurious result...' *See Owens v. City of Atlanta*, 780 F.2d 1564, 1567 (11th Cir. 1986)(citing *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1442 (11th Cir. 1985)." *Brooks v. Scheib*, 813 F.2d at 1193. The Eleventh Circuit has further interpreted *Monell* by holding that the municipality's failure to correct the constitutionally offensive actions of its police department may rise to the level of a "custom or policy" if the municipality tacitly authorizes these actions or displays deliberate indifference towards police misconduct.[4]

Despite ten written citizen complaints filed against Officer Scheib, the Eleventh Circuit determined that "there is no evidence that city officials were aware of past police misconduct[5]...Brooks never demonstrated that past complaints of police misconduct had any merit. Indeed, **the number of complaints bears no relation to their validity**." *Id*, 813 F.2d at 1193.

In *Brooks*, the Eleventh Circuit apparently surmised that there was a logical explanation beyond a question of fact, as to why a large number of complaints had been lodged against Scheib: "Officer Scheib patrolled a high crime area. A significant percentage of those Scheib arrested were continually in trouble with the law. These experienced customers frequently use citizens' complaints as a means of harassing officers who arrest them." *Brooks* at 1193, emphasis provided.

In addressing this same question of when an aggrieved citizen has provided sufficient evidence from which a jury could infer that a municipality has adopted a custom of

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4. *Brooks*, 813 F.2d 1193 citing *Cannon v. Taylor*, 782 F.2d 947, 951 (11th Cir. 1986) (citing *Turpin v. Mailet*, 619 F.2d 196 (2d Cir. 1980), *cert. denied*, 449 U.S. 1016, 101 S.Ct. 577, 66 L.Ed.2d 475 (1980)).

5. See *Cannon v. Taylor*, 782 F.2d at 951; compare *Depew v. City of St. Mary's Georgia*, 787 F.2d 1496 (11th Cir 1986).

permitting its police officers to use excessive force in the performance of their duties, the United States Court of Appeals for the Third Circuit in *Beck v. City of Pittsburgh*, 89 F.3d 966 (3rd Cir. 1996), *cert. denied*, 519 U.S. 1151, 117 S.Ct. 1086, 137 L.Ed.2d 219 (1997) recently interpreted municipal liability according to *Monell v. New York Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) differently. Citing *Pembaur*, 475 U.S. 469 (1986), the Third Circuit held that custom may also be established by evidence of knowledge and acquiescence.[6]

The Third Circuit in *Beck*, interpreted *City of Canton*[7] as allowing courts to adopt the "deliberate indifference" standard in policy and custom contexts such as the case at bar.[8] The Court held that "because the complaints, especially those during the year 1991, came in a narrow period of time and were of similar nature, a reasonable jury could have inferred that the Chief of Police knew, or should have known, of [Officer] Williams's propensity for violence when making arrests." *Beck*, 89 F.3d at 973.

III. The case of *Brooks v. Scheib* (11th Cir. 1987) and the prevailing precedent in the First, Second, Third, Fifth, and Ninth Circuits, best exemplified by the decision of the United States Court of Appeals for the Third Circuit in *Beck v. City of Pittsburgh* (3d Cir. 1996) are in direct conflict in interpreting and applying this Court's decision in *Monell v. New York Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611

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6. Beck, 89 F.3d at 971 citing Fletcher *v. O'Donnell*, 867 F.2d 791, 793 (3d. Cir 1989), *cert. denied*, 492 U.S. 919, 109 S.Ct. 3244, 106 L.Ed.2d 591 (1989).

7. *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989).

8. *Beck v. City of Pittsburgh*, 89 F.3d 972 (1996).

(1978); specifically on the issue of whether numerous prior citizen complaints filed with city police officials regarding an individual officer's repeated use of excessive force is sufficient to establish a question of fact as to knowledge, policy or custom on the part of the municipality for purposes of liability under 42 U.S.C.A. §1983.

The prevailing view appears to be that the existence of a number of complaints of a similar nature, whether they occurred before or after the incident in the suit at bar, constitute sufficient evidence to create an issue of fact as to the notice with which policymakers must be charged. *See Beck v. City of Pittsburgh*, 89 F.3d 966 (3rd Cir. 1996), *cert. denied*, 519 U.S. 1151, 117 S.Ct. 1086, 137 L.Ed.2d 219 (1997); *Vann c. City of New York*, 72 F.3d 1040, at 1049 (2d Cir.1995)("An obvious need may be demonstrated through proof of repeated complaints of civil rights violations; deliberate indifference may be inferred if the complaints are followed by no meaningful attempt on the part of the municipality to investigate or to forestall further incidents")(citations omitted). It should be of no concern whether the evidence of other misconduct occurred before or after the incident giving rise to the case at bar. *See Henry v. County of Shasta*, 132 F.3d 512 (9th Cir. 1997); *Foley v. City of Lowell*, 948 F.2d 10 (1st Cir. 1991); *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991); *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985).

In any of the circuits previously cited, (First, Second, Third, Fifth, or Ninth) Petitioner would have prevailed, and Defendants' Motion for Summary Judgment would have been denied because the prior, sustained citizen complaints, and volume of complaints would have constituted evidence of notice with which the City of Atlanta, Chief Harvard and Sgt. Dawkins must be charged. Similarly, the total number of complaints, and their perfunctory "investigation" and dismissal would have constituted evidence of municipal policy or custom. Since the outcome of Petitioner's case would

have differed drastically as between the Eleventh Circuit and the First, Second, Third, Fifth, and Ninth Circuits, he seeks a Writ of Certiorari to resolve this extremely important issue of law.

IV. The Court of Appeals and the District Court erred in holding (without citation of controlling precedent) that the prior citizen complaints against Defendant Wingo were "simply allegations" and "too speculative" to support Petitioner's claim, when at least two such prior complaints were sustained.

The panel judgment of the Court of Appeals entered on December 28, 2000 states that "the evidence regarding the citizen complaints was too speculative to support Bagley's claim. The complaints were simply allegations and Bagley failed to offer any proof of their substance or merit..." (December 28, 2000 Judgment). The Court of Appeals erred because several of the complaints against Wingo were substantiated and sustained by the City of Atlanta Police Department, such that ample evidence of notice to Wingo's superiors and the City of Atlanta existed.

In September 1990, a citizen named Otis Lett filed a complaint against Wingo for excessive force after he suffered and was hospitalized for blunt trauma to the head and injuries to his ribs. [R.59] Officer Wingo stated under oath that he did not beat Mr. Lett, but the report of the treating physician revealed that Mr. Lett could not have "fallen" as Officer Wingo stated. Later, Officer Wingo recanted his story and said that his flashlight might have hit Mr. Lett. The City of Atlanta Police Department cited Wingo and he received a two-day suspension without pay. In addition, Mr. Lett filed a civil action against the City of Atlanta for excessive force, which also constitutes notice to the City, of Officer Wingo's propensity to use excessive force and violence. Mr. Lett's civil case was eventually settled by payment to the Complainant. [R.63].

In a similar incident in September 1990, Officer Wingo responded to a domestic dispute call, and severely beat Chester Kelly. Mr. Kelly's common law wife who had initially called the police to her home, called the police again to report Officer Wingo's beating of her husband. She asked Wingo for the name of his supervisor, but Wingo refused to provide her with that information. Officer Wingo was disciplined for "failure to call a supervisor" and "failure to appear in court" resulting in a one-day suspension. [R. 59].

In November 1993, a citizen named Daphne Delaney filed a Complaint against Officer Wingo which resulted in "verbally counseling the Officer on the steps for proper courtesy in dealing with citizens".[R. 59].

Of the several complaints filed against Officer Wingo, these three resulted in disciplinary action by the Atlanta Police Department, therefore they can not be considered "simply allegations" and "too speculative to support Bagley's claim".

The Eleventh Circuit's judgment affirmed the District Court's ruling that the complaints failed to put the City of Atlanta, Chief Harvard and Sgt. Dawkins on the requisite "notice" to impose municipal liability according to *Brooks v. Scheib*, 813 F.2d 1191 (11th Cir. 1987). However, the case at bar is clearly distinguishable.

In *Brooks*, the Plaintiff presented evidence of the number of complaints against Scheib, but no evidence as to the merits of those complaints. At trial the only evidence as to the merits of the complaints was the testimony of Atlanta Officers that the complaints had been investigated and found to lack merit. This determination was not challenged by evidence presented by Plaintiff Brooks. The Court in *Brooks* held that the ten complaints against the Defendant did not constitute notice of police misconduct since the police department showed that the cases were investigated and that none of them had any merit.

In the present case, several of the complaints clearly had merit, resulted in disciplinary action, thereby substantiating the complaints, and placing Wingo's supervisors and the City on notice of his propensity to violence and excessive force. Unlike *Brooks*, there is more than ample evidence from which the jury could find that the "City knew or should have known that the natural consequence of its policy and practices would be the deprivation of constitutional rights." *Brooks* at 1193 citing *Owens v. City of Atlanta*, 780 F.2d 1564, 1567 (11th Cir. 1986).

In addition, a jury would be entitled to compare and evaluate the evidence with the conclusions of the police "investigators" and determine whether the conclusions of the police "investigators" were reasonable or just a "whitewash." As held in *Brooks*, the tacit authorization of unconstitutional conduct amounts to deliberate indifference toward police misconduct. "Examining the records of complaints against a police officer may be helpful," (*Brooks* at 1194) in determining an existing policy of toleration of abuse.

*Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) holds that a municipality shall be liable under 42 U.S.C. § 1983 if a "custom" or "policy" of the city is the "moving force" behind a constitutional violation. Id. at 690-694. The Eleventh Circuit has interpreted Monell as requiring that "[t]he municipality must be at fault in some sense for establishing or maintaining the policy which causes the injurious result..." *Owens v. City of Atlanta*, 780 F.2d 1564, 1567 (11th Cir. 1986) citing *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1442 (11th Cir. 1985). Evidence of prior substantiated claims provides evidence of a "custom" or "policy" of the City, and a basis for imposing liability, such that summary judgment on these issues should be precluded, and the issues resolved by the trier of fact.

In addition, the Supreme Court of the United States has held that "[t]he inadequacy of police training may serve

as a basis for §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton v. Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). The evidence of these prior substantiated complaints, and the failure to dismiss or reassign Defendant Wingo are sufficient for a jury to find a deliberate indifference by the City of Atlanta, Chief Beverly Harvard, and Sgt. Dawkins, to the rights of the persons who come in contact with the police.

Petitioner has alleged that Wingo's supervisors, Sargent Dawkins and Chief Harvard, are liable for the misconduct of officer Wingo because of their failure to control or dismiss a subordinate employee with a history of violent conduct. The evidence of substantiated prior complaints, and total number of complaints is relevant and sufficient to demonstrate the history of such misconduct, the supervisor's and City's knowledge of that behavior, and their toleration of such conduct, which in any other employment context would have warranted immediate dismissal.

Although the mere failure of a supervisor to investigate or discipline a subordinate after a single instance of misconduct will not subject the supervisor to liability for that single act, a supervisory officer may be liable if that supervisor knew or should have known of actual or potential problems with his subordinate and failed to take action to control or eliminate the problem. Appellants' #35 through #38 [R. 59] are the best evidence of such supervisory knowledge.

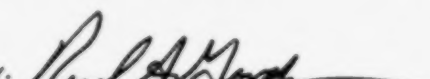
These incidents of prior substantiated complaints, coupled with the testimony of the complainants, are evidence which was known to Wingo's supervisors and The City, and were sufficient to place them on notice of Wingo's propensity to abuse citizens, violently attack them, and bring charges but fail to appear in court. According to the findings of the District Court, the Defendants have admitted that Wingo's supervisors knew Wingo's history.

Chief of Police Harvard, and Sgt. Dawkins as Wingo's supervisors can be held individually liable for their failure to discipline and their "failure to establish procedures to prevent future occurrences." *Larez v. City of Los Angeles*, 946 F2d 630 (9th Cir.1991). Evidence in the form of prior perjury, sustained complaints, lawsuits, statements of other victims and witnesses of Wingo's misconduct, and official complaint disciplinary files against Wingo, authorize a jury to conclude that the City of Atlanta, Chief Harvard, and Sgt. Dawkins have maintained a policy, practice, or custom of tolerating police misconduct in general, and of tolerating Wingo's misconduct in particular.

## CONCLUSION

Upon the above and foregoing citations of authority, Petitioner respectfully requests that this Court grant this Petition for Writ of Certiorari.

RICHARD A. GORDON, P.C.
Attorneys for Petitioner

BY: 
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# APPENDIX

## TABLE OF CONTENTS OF APPENDIX

Pursuant to Supreme Court Rule 14 (i), Petitioner hereby files the following relevant documents in this Appendix:


1. Per Curiam Opinion of United States Court of Appeals for the Eleventh Circuit dated December 28, 2000, in Case No. 99-15000, heard before Circuit Judges Carnes and Barkett, and the Honorable Louis H. Pollak, Senior U.S. District Judge for the Eastern District of Pennsylvania.
2. Order dated September 14, 1999, from the United States District Court, Northern District of Georgia (denying Defendants' Motion for Partial Summary Judgment).
3. Order dated November 2, 1999, from the United States District Court, Northern District of Georgia (granting Defendants' Motion for Partial Summary Judgment following Defendants' Motion for Reconsideration).
4. Per Curiam Opinion of United States Court of Appeals for the Eleventh Circuit on Petition for Rehearing and Petition for Rehearing En Banc dated March 22, 2001, in Case No. 99-15000, heard before Circuit Judges Carnes and Barkett, and the Honorable Louis H. Pollak, Senior U.S. District Judge for the Eastern District of Pennsylvania.
5. Statutory Text of 42 U.S.C.A. § 1983
6. Statutory Text of 28 U.S.C.A. § 1343
7. Text of United States Constitution, Amendment I.
8. Text of United States Constitution, Amendment IV.
9. Text of United States Constitution, Amendment V.
10. Text of United States Constitution, Amendment XIV.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 28 2000
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 99-15000

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D.C. Docket No. 96-00151-CV-CAM-1

JIMMY SCOTT BAGLEY,

Plaintiff-Appellant,

versus

J. G. WINGO,
BEVERLY HARVARD, as Chief of
Police of the City of Atlanta,
Georgia, et al.,

Defendants-Appellees,

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Appeal from the United States District Court
for the Northern District of Georgia

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(December 28, 2000)

Before CARNES and BARKETT, Circuit Judges, and POLLAK[1], Senior District Judge.

PER CURIAM:

Jimmy Scott Bagley appeals a summary judgment in favor of Chief Beverly Harvard and Sgt. B.S. Dawkins of the Atlanta Police

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1. Honorable Louis H. Pollak, Senior U.S. District Judge for the Eastern District of Pennsylvania, sitting by designation.

Department and the City of Atlanta on Bagley's 42 U.S.C. § 1983 claims alleging violations of his civil rights. On appeal, Bagley contends that the district court erred both in excluding the testimony of Allyson Collins from consideration in deciding the summary judgment motion and in concluding that even without her testimony there was insufficient evidence that Harvard, Dawkins, and the City had a custom, policy, or practice of deliberate indifference towards police misconduct. We affirm.

Bagley filed this action against Officer J.G. Wingo, Dawkins, Harvard, and the City of Atlanta, alleging that Wingo, a police officer employed by the Atlanta Police Department, arrested him without probable cause and with excessive force, thus depriving him of his constitutional rights in violation of 42 U.S.C. § 1983.[2] Bagley's action against Harvard, Dawkins, and the City of Atlanta is based on his claim that the City's procedures for handling citizens' complaints of police misconduct amounted to a custom, policy, or practice of deliberate indifference towards police misconduct and led to his injuries. In support of his contention that the City had a policy, custom, or practice of deliberate indifference towards and tacit approval of police misconduct, Bagley offered the following evidence: (1) the testimony of Allyson Collins, a person who investigates police abuse and misconduct for Human Rights Watch; (2) the written report issued by Human Rights Watch concerning these investigations; and (3) seven citizens' complaints alleging violence, threats of violence, or verbal abuse filed against Wingo. The trial court ruled that Collins' testimony and the Human Rights Watch report were inadmissible hearsay and that absent this testimony, the remaining evidence consisting of the several alleged citizen complaints against Wingo was insufficient to establish that Harvard, Dawkins, and the City had a custom, policy, or practice of deliberate indifference towards police misconduct. Bagley appeals those determinations.

We review the district court's evidentiary rulings for abuse of discretion. See Judd v. Rodman, 105 F.3d 1339, 1341 (11th Cir. 1997). We review de novo a district court's grant of summary judgment, applying the same legal standards as the district court. See

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2. Bagley's claims against Wingo are not part of this appeal.

Whatley v. CNA Ins.Cos., 189 F.3d 1310, 1313 (11th Cir. 1999).

Bagley argues on appeal that the Human Rights Watch report concerning that organization's investigations of Atlanta's response to police misconduct complaints is admissible under either Federal Rule of Evidence 803(8), the public records exception, or Federal Rule of Evidence 807, the residual exception to the hearsay rule. Rule 803(8) provides an exception to the hearsay rule for reports of "public offices or agencies" setting forth "factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstance indicate lack of trustworthiness." Fed. R. Evid. 803(8). Human Rights Watch is not a public agency and was not under any legal duty either to observe matters and report thereon or to conduct the investigations. We therefore find that the district court did not err in refusing to admit the report as a public record. We likewise find no error in the district court's exclusion of the report under the residual exception rule. See Balogh's of Coral Gables, Inc. v. Getz, Inc., 798 F.2d 1356, 1358 (11th Cir. 1986) ("we are particularly hesitant to overturn a trial court's admissibility ruling under the residual hearsay exception absent a "definite and firm conviction that the court made a clear error of judgment in the conclusion it reached based upon a weighing of the relevant factors") (citing Page v. Barko Hydraulics, 673 F.2d 134, 140 (5th cir. 1982)).

Bagley also argues that Collins's testimony was admissible as lay witness testimony and that she should have been permitted to present information she had obtained based on her investigation of Atlanta's response to complaints of police misconduct and her conclusion that "there seems to be a practice of deliberately failing to implement systems to hold officers accountable and to terminate officers who shouldn't be officers so that they don't go on to commit more abuses."[3] Under the circumstances of this case, we find no abuse of discretion in the district court's determination that the testimony of Collins as a lay witness was inadmissible hearsay.

Finally, we examine the question of whether in the absence of Collins' testimony and the Human Rights Watch report there was

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3. Bagley does not contend that Collins is an expert witness.

sufficient evidence that Harvard, Dawkins, and the City had a custom, policy, or practice of deliberate indifference towards police misconduct. We agree with the district court's determination that the evidence regarding the citizen complaints was too speculative to support Bagley's claim. The complaints were simply allegations and Bagley failed to offer any proof of their substance or merit. Therefore, we find that there is insufficient record support for a reasonable jury to have concluded that Harvard, Dawkins, and the City were acting in accord with a custom, policy, or practice of deliberate indifference towards police misconduct. Accordingly, the judgment of the district court is

AFFIRMED.

FILED IN CLERK'S
OFFICE
U.S.D.C. Atlanta
SEP 14 1999
Luther D. Thomas, Clerk
By: /s/, Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN P. NESBITT, JR. and
ANDREW JOSEPH MARTIN,
Plaintiff(s),

v.

J.G.WINGO, et al.,
Defendant(s).

CIVIL ACTION NO.
1:96-CV-1038-CAM

JIMMY SCOTT BAGLEY,
Plaintiff,

v.

J.G. WINGO, et al.,
Defendants.

CIVIL ACTION NO.
1:96-CV-151-CAM

ORDER

Plaintiffs, John P. Nesbitt, Jr., Andrew Joseph Martin, and Jimmy Scott Bagley, filed these suits against Defendants, Officer J.G. Wingo, Sgt. B.S. Dawkins, Chief Beverly Harvard, the City of Atlanta, and various other defendants, seeking to recover pursuant to § 1983 for violations of their civil rights as well as on various state law claims. After the Court granted motions for summary judgment as to all defendants except the City of Atlanta defendants, the cases went to trial on March 10, 1999. A mistrial was declared on March

11, 1999, and the Court granted permission for Defendants to file an out-of-time motion for summary judgment. The case is before the Court on Defendants' motion for partial summary judgment. For the reasons stated herein, the motion is DENIED in part and GRANTED in part.

FACTUAL AND PROCEDURAL BACKGROUND

On May 15, 1994, Plaintiffs attended the Midtown Music Festival. Plaintiffs allege that, as they were leaving the festival, they were assaulted, falsely arrested, and falsely charged with several crimes by Officer Wingo.

The Midtown Music Festival was a three day event at which City of Atlanta off duty police officers served as security guards. The security guards worked at the perimeter of the festival to prevent people from entering without paying, to direct pedestrian traffic, and to ensure that festival patrons left the festival in an orderly fashion.

At the time of the incident giving rise to this lawsuit, Officer Wingo was working as a security guard and was stationed at the intersection of Eleventh Street and Peachtree Walk, near an area used by the cleaning subcontractor for the collection of trash. The area behind Officer Wingo was not a designated exit; a fence blocked access to the street, but the fence was not clearly visible from the intersection. Officer Wingo was directing people to go to the left or to the right to designated exits. A group of port-a-potties were also located in the same general area. Bagley and a friend were waiting near the intersection for their dates to return from the restrooms.

Exactly what happened throughout the incident is in dispute. The parties agree, however, that, as Nesbitt, Nesbitt's wife, and Martin approached the intersection, Officer Wingo indicated that they could not leave the festival by going straight ahead but would have to turn left or right to use one of the designated exits. Nesbitt wanted to go straight ahead, even if it meant climbing the fence, because his car was nearby. After an initial confrontation, Nesbitt, his wife, and Martin turned and began moving toward one of the exits. As Nesbitt walked away from Wingo toward a designated festival exit, Nesbitt said that Wingo was "a fucking bonehead."

Nesbitt was arrested by Officer Wingo for disorderly conduct; Martin was arrested by Officer Patrick Reagan at the

direction of Officer Wingo for obstruction, and Bagley was arrested by Officer Wingo for obstruction. All three were transported to the City of Atlanta jail. All charges were later dismissed.

## LEGAL STANDARDS AND ANALYSIS

### I. Summary Judgment

Courts should grant summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears "the initial responsibility of informing the . . . court of the basis for its motion, and identifying those portions of [the record] 'together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Adickes v. S.H. Kress and Co., 398 U.S. 144, 159-60 (1970); United States v. Four Parcels of Real Property, 941 F.2d 1428, 1437-38 (11th Cir. 1991).

Once the moving party has met this initial burden, the "burden shift[s] to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." Clark v. Coats & Clark, 929 F.2d 604, 608 (llth Cir. 1991). Whether facts are material is determined by the applicable substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The court views the evidence in the light most favorable to the party opposing the motion. Adickes, 398 U.S. at 158-59. Moreover, "[r]easonable doubts as to the facts should be resolved in favor of the nonmoving party," Borg-Warner Acceptance Corp. v. Davis, 804 F.2d 1580, 1582 (11th Cir. 1986), "and all justifiable inferences are to be drawn in his favor," Everett v. Napper, 833 F.2d 1507, 1510 (llth Cir. 1987). "For factual issues to be considered genuine, they must have a real basis in the record." Hairston v. Gainesville Sun Publishing Co., 9 F.3d 913, 919 (11th Cir. 1993). An issue is not genuine if it is created by evidence that is "merely colorable" or is "not significantly probative." Anderson, 477 U.S. at 249-50. The unsupported, self-serving statements of the party opposing summary judgment are insufficient to avoid summary judgment. Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 714 (llth Cir. 1984).

II. Liability of Governmental Entity

"Local governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690 (1978). Local governments may also be "sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels," id. at 690-91, if the custom is "so pervasive, as to be the functional equivalent of a policy adopted by the final policymaker," Church v. City of Huntsville, 30 F. 3d 1332, 1343 (llth Cir. 1994).

"[A local government] can be found liable under § 1983 only where the [local government] itself causes the constitutional violation at issue." City of Canton v. Harris, 489 U.S. 378, 385 (1989). "Respondeat superior or vicarious liability will not attach under § 1983." Id. "It is only when the execution of the government's policy or custom inflicts the injury that the municipality may be held liable under § 1983." Id. (internal quotation marks omitted). "Thus, [the] first inquiry in any case alleging municipal liability under § 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." Id.

III. Liability of Supervisor

"Like municipalities, supervisors cannot be held liable for the acts of employees solely on the basis of respondeat superior." Fundiller v. City of Cooper City, 777 F.2d 1436, 1443 (11th Cir. 1985). Although "[s]upervisory liability is not limited . . . to those incidents in which the supervisor personally participates in the deprivation[,] [t]here must be a causal connection between the actions of the supervisory official and the alleged deprivation." Id. "This causal connection can be established when a history of widespread abuse puts the responsible supervisor on notice of the need for improved training or supervision, and the official fails to take corrective action." Id.

"Supervisory liability is imposed against a supervisory official in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivations of which the complaint is made; or for conduct that showed a reckless or callous indifference to the rights of others." Larez v. City of Los Angeles, 946 F.2d 630, 646 (9th Cir. 1991).

IV. Qualified Immunity

"Qualified immunity protects government officials performing discretionary functions from civil trials (and the other burdens of litigation, including discovery) and from liability if their conduct violates no 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" Lassiter v. Alabama A & M University, 28 F. 3d 1146, 1149 (11th Cir. 1994) (en banc). "That qualified immunity protects government actors is the usual rule; only in exceptional cases will government actors have no shield against claims made against them in their individual capacitities." Id. (emphasis in original). "Unless a government agent's act is so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing, the government actor has immunity from suit." Id. "Because qualified immunity shields government actors in all but exceptional cases, courts should think long and hard before stripping defendants of immunity." Id.

In a case where qualified immunity is claimed, a dispute of material fact will not prevent the grant of summary judgment "if the legal norms allegedly violated were not clearly established at the time of the challenged actions." Rich v. Dollar, 841 F.2d 1558, 1564 (11th Cir. 1988). On the other hand, "if the legal norms allegedly violated were as a matter of law clearly established at the appropriate time, a genuine fact issue as to what conduct the defendant engaged in would preclude a grant of summary judgment based upon qualified immunity." Id. at 1565.

The Eleventh Circuit has established a two-step framework for considering a claim of qualified immunity. First, the defendant must prove that "he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." Id. at 1563.

Id. at 1563. Then, "the burden shifts to the plaintiff to show . . . that the defendant public official's actions violated clearly established constitutional law." Id. at 1564 (internal quotation marks omitted).

"A government official acts within his or her discretionary authority if objective circumstances compel the conclusion that challenged actions occurred in the performance of the official's duties and within the scope of this authority." Hill v. DeKalb Regional Youth Detention Center, 40 F.3d 1176, 1185 n.17 (11th Cir. 1994). If the actions at issue were carried out by the government official in the performance of his normal job duties and were within the authority delegated to him by the government, they were within the officials discretionary authority. Rich, 841 F.2d at 1563.

"For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances." Lassiter, 28 F.3d at 1150 (emphasis in original). "The subjective intent of government actors plays no part in qualified immunity analysis." Id. "Objective legal reasonableness is the touchstone." Id.

V. Section 1983 Claims

"[I]n any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." Parratt v. Taylor, 451 U.S. 527, 535 (1981), overruled in part on other grounds, Daniels v. Williams, 474 U.S. 327 (1986). See, also, Albright v. Oliver, 510 U.S. 266, 271 (1994) (The first step in considering any claim under section 1983 is "to identify the specific constitutional right allegedly infringed."). If the defendant in a § 1983 action is a governmental entity, the initial inquiry must focus on: "(1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the [governmental entity] is responsible for that violation." Collins v. Harker Heights, 503 U.S. 115, 120 (1992).

A. Probable Cause

"A warrantless arrest without probable cause violates the Constitution and forms the basis for a section 1983 claim." Marx v. Gumbinner, 905 F.2d 1503, 1505 (11th Cir. 1990). "Probable cause exists if 'the facts and circumstances within the officer's knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.'" Post v. City of Fort Lauderdale, 7 F.3d 1552, 1557-58 (11th Cir. 1993) (quoting Von Stein v. Brescher, 904 F. 2d 572, 578 (11th Cir. 1990)), modified in unrelated part, 14 F.3d 583 (11th Cir. 1994). "[P]robable cause must be judged not with clinical detachment but with a common sense view to the realities of normal life." Marx, 905 at 1506 (quotations omitted)(citing Wilson v. Attaway, 757 F.2d 1227, 1235 (11th Cir. 1985)).

"The reasonableness of the officers' conduct must be judged against an objective standard: 'would the facts available to the officer at the moment of the seizure or search warrant a man of reasonable caution in the belief that the action taken was appropriate.'" United States v. Blackman, 66 F.3d 1572, 1576 (11th Cir. 1995) (quoting Courson v. McMillian, 939 F.2d 1479, 1498 (11th Cir. 1991)), cert. denied, 517 U.S. 1126 (1996) and 519 U.S. 967 (1996). "[I]n making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." Courson, 939 F.2d at 1489 n.16.

"In a case involving a warrantless search and seizure, the question of whether qualified immunity should be held to exist turns upon whether there was arguable probable cause, as opposed to probable cause in fact." Eubanks v. Gerwen, 40 F.3d 1157, 1160 (11th Cir. 1994). "The standard of arguable probable cause is whether a reasonable officer in the same circumstances and possessing the same knowledge as the officer in question could have reasonably believed that probable cause existed in the light of well-established law." Id. (emphasis in original). "It is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials-like other officials who act in ways they reasonably

reasonably believe to be lawful-should not be held personally liable." Lindsey v. Storey, 936 F.2d 554, 559 (11th Cir. 1991) (quoting Anderson v. Creighton, 483 U.S. 635 (1987).

B. Disorderly Conduct

O.C.G.A. § 16-11-39(a) provides:

> A person commits the offense of disorderly conduct when such person commits any of the following:
>
> (3) Without provocation, uses to or of another person in such other person's presence, opprobrious or abusive words which by their very utterance tend to incite to an immediate breach of the peace, that is to say, words which as a matter of common knowledge and under ordinary circumstances will, when used to or of another person in such other person's presence, naturally tend to provoke violent resentment, that is, words commonly called "fighting words" . . . .

Section 106-81 of the City of Atlanta Code of Ordinances provides:

> It shall be unlawful for any person within the corporate limits of the city to engage in any conduct described in the following subsections;
> (7) Direct fighting words toward another, that is, words which by their very nature tend to incite an immediate breach of the peace;
> (10) stand or remain in or about any street, sidewalk, overpass or public way so as to impede the flow of vehicular or pedestrian traffic, and to fail to clear such street, sidewalk, overpass or public way after being ordered to do so by a police officer or other lawful authority. . . .

"[T]he mere use of obscene and vulgar or profane language is not necessarily a crime . . . unless such language is also 'opprobrious or abusive' and therefore constitutes 'fighting words.'" Crollev v. State, 182 Ga. App. 2, 3-4 (1987) [T]he crucial issue is whether [the] language constituted words, expressions or acts which have a direct

tendency to cause immediate acts of violence by the person to whom the speech or act is addressed." Anderson v. State, 231 Ga. App. 807, 809, cert. denied (1998) (internal quotation marks omitted). Even words that are "rude, crude, and socially unacceptable" may not be "sufficiently belligerent to incite an immediate breach of the peace." Lundgren v. State, 238 Ga. App. 425 (1999) (quoting City of Macon v. Smith, 244 Ga. 157, 159 (1979). "Whether words are of such character that their use is calculated to cause a breach of the peace is determined by 'all the facts and circumstances.'" Crolley, 182 Ga. App. at 3. When the party using the "opprobrious or abusive" words alleges that he was provoked into using them, whether the provocation is sufficient to justify the words used is a question for the jury. Dyer v. State, 99 Ga. 20, 22 (1896); Anderson, 231 Ga. App. at 810. The Georgia courts have held that where a person's unprovoked "loud and abusive use of obscene and insulting language to a [police officer]" attracts a crowd of people, the words constitute "fighting words." Brooks v. State, 166 Ga. App. 704, 705 (1983) (citing Johnson v.State, 143 Ga. App. 826 (1997)).

C. Excessive Use of Force

"[A]ll claims that law enforcement officers have used excessive force-deadly or not-in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." Graham v. Connor, 490 U.S. 386, 395 (1989) (emphasis in original). "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake. Id. at 396. "Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Id. "Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect

the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Id. (internal citations and quotation marks omitted). See, also, Gold v. City of Miami, 121 F.3d 1442, 1446 (11th Cir. 1997), cert. denied, 119 S. Ct. 165 (1998). "The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Graham, 490 U.S. at 396. "[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Id. at 397. This inquiry includes consideration of "the subject's ability to harm, his opportunity to harm, and whether someone was in jeopardy of being harmed by the subject at the time the officer used force against the subject." Samples v. City of Atlanta, 916 F.2d 1548, 1551 (11th Cir. 1990).

"The Fourth Amendment does not require officers to use the least intrusive or even less intrusive alternatives in search and seizure cases. The only test is whether what the police officers actually did was reasonable." Menuel v. City of Atlanta, 25 F.3d 990, 996-97 (11th Cir. 1994) (quoting Plakas v. Drinski, 19 F.3d 1143, 1148-50 (7th Cir.), cert. denied, 513 U.S. 820 (1994)). "[P]olice must pursue crime and constrain violence, even if the undertaking itself causes violence from time to time." Id. at 997.

"[U)nless a controlling and factually similar case declares the officials conduct unconstitutional, an excessive-force plaintiff can overcome qualified immunity only by showing that the officials conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of caselaw." Smith v. Mattox, 127 F.3d 1416, 1419 (11th Cir. 1997). "The hazy border between permissible and forbidden force is marked by a multifactored, case-by-case balancing test." Id. "In this inquiry, the officer's intent, whether evil or good, is irrelevant." Id. "Because this standard establishes no bright line, qualified immunity applies unless application of the standard would inevitably lead every reasonable

officer in [the defendant's] position to conclude the force was unlawful." Gold, 121 F.3d at 1446.

VI. Analysis

A. Officer Wingo

Officer Wingo contends he is entitled to qualified immunity as to Plaintiffs' claims for false arrest because Nesbitt's refusal to go to the approved exits and shouting that Officer Wingo was "a fucking bonehead" violated O.C.G.A. § 16-11-39 (disorderly conduct) and City Ordinance § 106-81 (fighting words, impeding the flow of traffic) and because Bagley's admitted position in a group of people who were shouting at him for arresting Nesbitt justifies his arrest for obstruction. He contends he is entitled to qualified immunity as to Plaintiffs' claims for use of excessive force because neither Nesbitt nor Bagley suffered any injuries.

Plaintiffs contend there are issues of material fact including: (1) whether Officer Wingo initiated the confrontation by using obscene and abusive language and provoked the comment from Nesbitt, (2) whether Nesbitt intended Officer Wingo to hear his comment, (3) whether Bagley did or said anything that could be construed as obstructing the arrest of Nesbitt, (4) whether Officer Wingo attacked Nesbitt and Bagley from behind without warning, (5) whether Nesbitt resisted arrest, and (6) whether Nesbitt and Bagley posed a threat to the safety of Officer Wingo or others.

In his deposition, Wingo testified: (1) after Nesbitt began walking away, he turned back and shouted, "You are a fucking bonehead"; (2) he called Nesbitt back to place him under arrest for disorderly conduct for using loud abusive language; (3) Nesbitt took a swing at him without provocation; (4) he grabbed Nesbitt and attempted to take him to the ground and handcuff him; (5) while he was arresting Nesbitt, Bagley and Martin began yelling and coming at him; (6) he repeatedly told Bagley and Martin to move away; (7) while holding Nesbitt, he moved him from left to right, using him as a shield between himself and Bagley and Martin; (8) Nesbitt was resisting the entire time; (9) there was a large crowd of people, many of whom were yelling, objecting to the treatment of Nesbitt; (10) he finally got Nesbitt to the ground; (11) he held Nesbitt face down with his knee in Nesbitt's back while he handcuffed Nesbitt and placed him

under arrest; (12) he went after Bagley who had moved back into the crowd and arrested him; and (13) Officer Reagan handcuffed Martin, who was also placed under arrest. Officer Wingo testified that all three men were obviously intoxicated.

In his deposition, Nesbitt testified: (1) he and his wife had, at most, two beers each during the approximately five to six hours they were at the Festival and were not intoxicated; (2) he, his wife, Martin, and Pete Sobel were leaving the Festival together when they encountered Officer Wingo; (3) they were trying to walk directly to their car which was parked about a block away; (4) they came to an intersection where you could turn left or right or go straight ahead and they started to walk straight ahead but were still in the middle of the intersection; (5) Officer Wingo told them to "go the fuck with everybody else"; (6) he took offense at Officer Wingo's language and told him he didn't appreciate his talking to them that way; (7) Officer Wingo said, "I don't give a fuck what you care about" and continued to be verbally abusive; (8) they then turned and walked off; (9) when they were about 15 feet away, he turned to his wife, away from Officer Wingo, and said that Officer Wingo was "a fucking bonehead"; (10) he never intended Officer Wingo to hear his comment; (11) one of the men with him turned and saw Officer Wingo just before Officer Wingo attacked from behind; (12) Officer Wingo grabbed him in a full nelson and bounced him off a car; (13) he told Officer Wingo that he was not resisting, but Officer Wingo continued to throw him around "like a rag doll," although Officer Wingo never said anything; (14) at one point Officer Wingo threw him into the side or front of a car and cracked his two front teeth; (15) Officer Wingo threw him to the ground so hard he bounced; and (16) Officer Wingo said, "You hit me in the face" and arrested him. Nesbitt further testified that after he was arrested, the crowd was visibly upset about what Officer Wingo had done and several people were stating that they didn't approve but that no one threatened Officer Wingo and that Martin never said anything until after Nesbitt was arrested and then he only asked what Nesbitt was being arrested for. Nesbitt testified that after being released from jail, he went to the hospital and he had a wrenched neck and abrasions on his legs and arms in addition to the two cracked teeth. Finally, Nesbitt testified that when he filed his

complaint with the City of Atlanta Police Department, he offered to provide names of witnesses but the person taking the information stated that they would want to know the names later in the investigation but not at that time; however, no one ever contacted him for the names of witnesses.

In his deposition, Bagley testified: (1) he and his date each had two beers during the several hours they were at the Festival but were not intoxicated; (2) as he was leaving the Festival, he and his friends stopped for their dates to use the restrooms; (3) while they was waiting for their dates to return from the restroom, he heard a lot of people start yelling; (4) he saw a man being jerked around by a police officer; (5) the officer was arresting the man, who kept saying he wasn't resisting arrest; (6) he and his friends were discussing what was happening, commenting about "how badly the guy was being treated," when the wife of the man who was arrested asked him if he saw what happened; (7) when he told her he had, she asked for his phone number or something and he said, "Sure"; (8) when his date returned from the restroom, he turned to speak to her; (9) during the time he was waiting and watching the man being arrested, he never came within five feet of the police officer and never said anything to the officer; (10) the police officer hit him from behind at the base of his skull and neck hard enough to knock him to his knees; (11) the officer then dragged him by his hair which was long and in a ponytail; (12) the officer slammed him into a truck or Blazer and flung him to the ground; (13) immediately before being hit, he heard someone say something to the effect, "I'm going to get this long haired mother fucker myself"; (14) the officer put his knee on Bagley's back, pulled his arms up high behind him, and handcuffed him; (15) the officer came very close to his face and said "You do want a piece of me, don't you? You'd love for me to let you out of these cuffs," or something to that effect and kept poking at him; (16) as more officers arrived at the scent, the officer who handcuffed him left him without ever explaining what he was accused of doing; and (17) while waiting, the other two men who were arrested kept asking why they were being arrested. Bagley testified that shortly after the incident he began seeing a chiropractor for headaches, a stiff neck, and shooting pains in his lower back.

Plaintiffs have presented sufficient evidence to raise genuine issues of material fact relating to (1) the existence of even arguable probable cause to arrest them and (2) whether the force used in making the arrests was excessive. Defendant Wingo is not entitled to summary judgment based on qualified immunity.

B. Chief Harvard, Sgt. Dawkins, and the City of Atlanta

Chief Harvard and Sgt. Dawkins contend they are entitled to qualified immunity as to Plaintiffs' claims against then in their individual capacities because Plaintiffs can produce no evidence linking them causally to Officer Wingo's use of excessive force or false arrest because Plaintiffs cannot show that either Chief Harvard or Sgt. Dawkins knew of Officer Wingo's alleged predilection toward false arrest or excessive use of force.

The City of Atlanta contends it is entitled to summary judgment because Plaintiffs cannot show that it was deliberately indifferent to their constitutionally protected rights because they cannot show that it knew or should have known that Officer Wingo would use excessive force or falsely arrest them. The City contends there is no evidence that it failed to sufficiently investigate citizen complaints against its police officers.

Plaintiffs contend the evidence of the complaints about and investigations of Officer Wingo from 1990 to 1995 are sufficient to show Officer Wingo had a propensity for violence and that Chief Harvard, Sgt. Dawkins, and the City knew or should have known of Officer Wingo's history of misbehavior including a propensity to verbally abuse citizens, attack without provocation, and to bring charges but fail to appear in court. Plaintiffs further contend that the City's duty to supervise its police officers includes the duty to adequately investigate complaints against the officers and that the evidence shows the City failed to properly investigate citizens' complaints.

Defendants admit that Chief Harvard, Sgt. Dawkins, and the City of Atlanta were aware of Officer Wingo's disciplinary record which includes the following relevant claims:

(1) in September 1990, Otis Lett filed a complaint alleging he was hit in the head several times and kicked in the side by Officer Wingo as he was being arrested. Officer Wingo admitted that

he hit and kicked Lett although his initial report of the incident indicated that Lett struck his head twice on the pavement when Officer Wingo knocked him to the ground. The complaint was investigated by Sgt. W. M. Adams and was sustained. Officer Wingo was suspended without pay for two days. Lett also filed a lawsuit against Officer Wingo and the City of Atlanta alleging the City failed to adequately train its police officers and Officer Wingo used excessive force in arresting him. The case was settled.

(2) in September 1990, Chester E. Kelly filed a complaint alleging he was kicked and hit in the head by Officer Wingo who also threatened bodily harm. Kelly and his common law wife were involved in a domestic dispute, and Kelly was arrested but the charges were dismissed when Officer Wingo failed to appear in court. Officer Wingo denied that he struck, kicked, or threatened Kelly but alleged Kelly was violent and threatened the officers. Other officers at the scene also denied that Kelly was struck or kicked and concurred that Kelly was irate, violent, and threatening the officers. The complaint was investigated by Sgt. C. A. Turner and was not sustained although Officer Wingo received a one day suspension for failing to appear in court.

(3) in May 1992, Kota Andrews filed a complaint alleging Officer Wingo struck him about his back, neck and head with a nightstick and also cursed and spit on him. Officer Wingo denied the allegations but admitted that he pushed Andrews (along with other members of the crowd) with his nightstick because Andrews failed to move on when directed to do so. Although the incident occurred during a large group demonstration and a photograph of Andrews and others appeared in a local newspaper, the report indicates that neither witnesses to nor photographs of the incident could be found. The complaint was investigated by Sgt. J. J. Dallas and was found not sustained. An appeal of that decision was investigated by Lt. S. M. O'Brien, and the decision was upheld.

(4) in July 1992, Timothy A. Ware filed a lawsuit against the City of Atlanta and thirteen police officers including Officer Wingo. The suit alleged Officer D. C. Johnson shot Ware without provocation when the vehicle Ware was driving was stopped after an automobile chase and that other officers beat Ware when he

was again stopped after leaving the scene where he had been shot. He contended the City failed to adequately train its officers and that the failure resulted in the use of excessive force against him. The case was settled.

(5) in November 1993, Daphne Delany filed a complaint alleging that during the Arts Festival at Piedmont Park, she and a friend were almost trampled by Officer Wingo and his horse; that Officer Wingo showed no concern for their safety other than to yell at them to get out of the way; that when she spoke to Officer Wingo later, he was rude and abrasive and told her that if they had been hurt it would have been their own fault. Officer Wingo denied that he was rude and abrasive but stated that his horse was startled by a noise and started turning in circles; that he asked the two women to move because his horse was heading toward them; that he ordered them to move when they failed to comply with his request; that he didn't see them after he got his horse under control; and that when Delany approached him, she was irate and very loud. The complaint was investigated by Sgt. Dawkins. Although the complaint was not sustained, Officer Wingo was "verbally counseled on the steps for proper courtesy in dealing with citizens."

(6) in March 1994, Warren Pemberton filed a complaint alleging he was verbally abused by Officer Wingo during a traffic stop. Pemberton's allegations were supported by the testimony of Stefan Bullard who was with Pemberton and was arrested at the time. Officer Wingo denied Pemberton's allegations and testified that Pemberton was hostile, very agitated, and used abusive language. Officer T. A. Cunningham testified that she did not hear Officer Wingo refer to either Bullard or Pemberton in a discourteous manner during the time she was present at the scene following the initial stop. The complaint was investigated by Sgt. Dawkins and was not sustained.

(7) in April 1995, Terronce Tillman filed a complaint alleging he and Ron Jackson were approached for no apparent reason by Officer Wingo who "kept forcing his horse in our face"; after arresting Jackson, Officer Wingo crossed the street and began yelling at a young man, used his horse to force the man back and forth between two poles, hit the man on the head causing him to fall to the

ground, and refused to let anyone aid the man who was bleeding. These allegations were confirmed in substantial part by six witnesses who agreed that Officer Wingo pinned the young man to the wall with his horse before hitting him with his nightstick. Some of the witnesses also testified that the young man who was hit initiated the confrontation by telling Officer Wingo that Tillman and his friend should be left alone and that the young man told Officer Wingo that he "wasn't going to run" before Officer Wingo started hitting him. Officer Wingo testified that he arrested Jackson for calling him a "mother fucker"; that he crossed the street to arrest Walter Butler, Jr. who had yelled "You motherfucker, leave that man alone"; that he moved his horse close to Butler to dismount and handcuff Butler; that Butler started resisting arrest, moving up and down, and punched him in the thigh; that he attempted to contain Butler by pinning him to the wall with the horse; that, as he pulled out his nightstick, Butler jerked on the horse's reins, cutting the horse's mouth; that he struck Butler one time on the shoulder to get him away from the horse; that a crowd had gathered and was yelling profanities at him and other officers; and that he refused to allow anyone to assist Butler because medical assistance had been summoned. Officer Reagan testified that he did not see the confrontation between Officer Wingo and Butler. Sgt. Dawkins testified that he arrived on the scene after the confrontation was over; that witnesses told him Officer Wingo struck Butler with his nightstick; that there was no physical evidence Butler was hit on the head, although he had a small cut on his lower gum; that Butler was cursing and uncooperative; and that the next morning he found a cut and abrasion on the side of Officer Wingo's horse's mouth. Butler, who is mentally disabled, refused to make a statement. The complaint was investigated by Sgt. Dawkins. Despite the testimony of six witnesses who believed the force used on Butler was excessive and the lack of any witnesses on Officer Wingo's behalf, the complaint was not sustained because of the detailed explanation in Officer Wingo's report and the injury to the horse's mouth. In a memo about the incident, Lt. P. N. Andresen told Major D. M. Neely that "None of the witnesses could see Mr. Bulter's actions as their view was undoubtably blocked by the horse."

A classification of "Not Sustained" means "evidence was

insufficient to prove or disprove the allegations stated in the complaint."

Allyson Collins, who is employed by Human Rights Watch and has spent approximately four years studying police abuse and brutality in the United States, investigated and researched citizen complaints of excessive force or police abuse in Atlanta and other cities. In 1998, Human Rights Watch published Shielded from Justice, a report about Collins' research. In 1996, Human Rights Watch published Modern Capital of Human Rights? Abuses in the State of Georgia, a report of the results of Collins' research in Georgia. Collins testified that her research showed: (1) there is no functional civilian review in Atlanta; (2) the internal affairs unit often conducts incomplete investigations or investigations biased in favor of the officers; (3) the threshold set for the early warning system is sufficiently low that officers are not being identified before they commit additional abuses; (4) internal investigations are probably biased because they are often performed by the officer's supervisor "who stands to lose a lot if it looks as though their underling is committing abuses and that they're tolerating it"; (5) witnesses to instances of alleged abuse are frequently not interviewed or their testimony is ignored; and (6) Atlanta seems to have "a practice of deliberately failing to implement systems to hold officers accountable and to terminate officers who shouldn't be officers so that they don't go on to commit more abuses."

Although the evidence shows that Officer Wingo was disciplined several times for failing to appear in court, there is no evidence that he failed to appear because the charges he had filed were false. Chief Harvard, Sgt. Dawkins, and the City of Atlanta are entitled to summary judgment on the claims against them for false arrest.

Plaintiffs have presented sufficient evidence to show that there are genuine issues of material fact as to whether the City had a policy, practice, or custom of failing to adequately investigate citizen complaints and, if so, whether that policy, practice, or custom was part of a policy, practice, or custom to allow the use of excessive force by police officers. Plaintiffs have also presented sufficient evidence to show that there are genuine issues of material whether

Chief Harvard and Sgt. Dawkins knew that Officer Wingo had a propensity to use excessive force in making arrests. Chief Harvard, Sgt. Dawkins, and the City of Atlanta are not entitled to summary judgment on the claims against them for use of excessive force.

## CONCLUSION

For the reasons stated herein, Defendants' motion for partial summary judgment is DENIED as to claims against Officer Wingo for false arrest and for the use of excessive force and against Chief Harvard, Sgt. Dawkins, and the City of Atlanta for the use of excessive force and is GRANTED as to claims against Chief Harvard, Sgt. Dawkins, and the City of Atlanta for false arrest [Civil Action No. 1:96-CV-1038-CAM, Docket No. 62-1; Civil Action No. 1:96-CV-151-CAM, Docket No. 57-1]. The amended pre-trial order is due thirty (30) days from the date of this order.

So ORDERED, this 14th day of September, 1999.

/s/ Charles A. Moye, Jr.
UNITED STATES DISTRICT JUDGE
CHARLES A. MOYE, JR.

CAM:J

FILED IN CLERK'S OFFICE
U.S.D.C. - Atlanta
NOV 02 1999
LUTHER D. THOMAS, Clerk
By: /s/ J.White Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN P. NESBITT, JR. and
ANDREW JOSEPH MARTIN,

Plaintiff(s),

v.

J.G.WINGO, et al.,

Defendant(s).

CIVIL ACTION NO.

1:96-CV-1038-CAM

JIMMY SCOTT BAGLEY,

Plaintiff,

v.

J.G. WINGO, et al.,

Defendants.

CIVIL ACTION NO.

1:96-CV-151-CAM

ORDER

On September 14, 1999, the Court entered an order denying

Defendants' motion for summary judgment as to claims against Officer Wingo for false arrest and for the use of excessive force and as to claims against chief Harvard, Sgt. Dawkins, and the City of Atlanta for the use of excessive force, and granting Defendants' motion as to claims against Chief Harvard, Sgt. Dawkins, and the City of Atlanta for false arrest. The cases are before the Court on Defendants' motion for reconsideration of the September 14, 1999 Order.

## LEGAL STANDARDS AND ANALYSIS

### I. Motion for Reconsideration

Motions for reconsideration should be filed only when "absolutely necessary." LR 220-6, NDGA. Reconsideration may be necessary if there is (1) newly discovered evidence, (2) an intervening development or change in controlling law, or (3) the need to correct a clear error or prevent manifest injustice. Preserve Endangered Areas v. United States Army Corps of Engineers, 916 F. Supp. 1557, 1560 (N.D.Ga. 1995), aff'd, 87 F.2d 1242 (11th Cir. 1996).

Defendants contend the Court failed to rule on their motion to strike the report and deposition testimony of Plaintiffs' expert witness Allyson Collins and that, without Collins testimony, the other evidence is insufficient to support the Court's ruling as to the excessive force claims against Chief Harvard, Sgt. Dawkins, and the City.

Defendants' motion to strike and reply brief were filed in the Clerk's Office on September 3, 1999. They were not entered on the case dockets until September 16, 1999, and were, therefore, not taken into consideration in the September 14, 1999 Order. Consequently, the Court grants Defendants' motion for reconsideration as to Plaintiffs' claims of excessive force against Chief Harvard, Sgt. Dawkins, and the City.

### II. Motion to Strike

"Rather than filing a motion to strike as under Rule 12, the proper method for challenging the admissibility of evidence [filed in support of a motion for summary judgment] is to file a notice of objection to the challenged testimony." Morgan v. Sears, Roebuck and Co., 700 F. Supp. 1574, 1576 (N.D. Ga. 1988).

The Court denies Defendants' motion to strike but will consider

Defendants' objections in evaluating the applicability of Collins' report and testimony to Defendants' motion for summary judgment.

III. Motion for Summary Judgment

The legal standards for evaluating a motion for summary judgment were stated in the September 14, 1999 Order and will not be restated here.

Defendants contend the report and deposition testimony of Allyson Collins should be excluded because: (1) Plaintiffs failed to comply with the requirements of Fed. R. Civ. P. 26(a)(2)(B) and the Court granted Defendants' motion in limine to exclude the testimony of Collins; (2) the proffered report, Shielded from Justice, is inadmissible hearsay; (3) Collins is not qualified to testify as an expert; and (4) Collins' testimony is outside the scope of the reopened discovery. Defendants further contend that, without the Collins evidence, there is insufficient evidence to show that Chief Harvard, Sgt. Dawkins, and the City should be held liable for Wingo's alleged use of excessive force.

Plaintiffs contend Defendants had notice of the identity of Collins and the nature of the anticipated testimony as early as December 1998; that Defendants were given notice of Collins' deposition but filed no objections and, in fact, participated in the deposition; that Collins, as an outside investigator, is competent to testify; that the report of an investigation of a police department by an outside body may be admitted into evidence; and that the evidence is sufficient to show that Chief Harvard, Sgt. Dawkins, and the City were on notice of Wingo's tendency to use excessive force.

In response to Defendants' motion in limine objecting to the expert testimony of Allyson Collins, the Court found that Plaintiffs had not complied with Fed. R. Civ. P. 26(a)(2)(B) and sustained the objection. After declaring a mistrial, the Court granted Plaintiffs' motion to reopen discovery for sixty days. Although Plaintiffs provided several reasons to reopen discovery, the order granting the motion placed no limits on the discovery which might be taken. Collins was deposed on July 6, 1999, with counsel for all parties present.

"A municipality's failure to correct the constitutionally offensive actions of its police department may rise to the level of a

'custom or policy' if the municipality tacitly authorizes these actions or displays deliberate indifference towards the police misconduct." Brooks v. Scheib, 813 F.2d 1191, 1193 (11th Cir. 1987). "A single incident by a lower level employee acting under color of law . . . does not suffice to establish either an official policy or a custom. However, if custom can be established by other means, a single application of the custom suffices to establish that it was done pursuant to official policy and thus to establish the agency's liability." Fletcher v. O'Donnell, 867 F.2d 791, 793 (3rd Cir.), cert. denied, 492 U.S. 919 (1989). A large number of complaints alone is insufficient to show deliberate indifference as "the number of complaints bears no relation to their validity." Brooks, 813 F.2d at 1193. Where the complaints in evidence have been "fully investigated and found to be lacking in merit," the evidence is insufficient to show that the city "knew or should have known that the natural consequences of its policy and practices would be the deprivation of constitutional rights." Id.

One of the exceptions to the hearsay rule in civil actions are "factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." Fed. R. Evid. 803(8)(C). Thus, the report of a governmental agency authorized by law to conduct a particular investigation may be admitted as evidence. See Gentile v. County of Suffolk, 926 F.2d 142, 148 (2nd Cir. 1991). Plaintiffs have not cited, and the Court could not find, any authority permitting the admission, without further validation, of a report by a non-governmental agency conducting its own investigation.

Collins is employed by Human Rights Watch as a researcher, author, and editor. Human Rights Watch is "an independent, nongovernmental organization, supported by contributions from private individuals and foundations worldwide." Human Rights Watch, Shielded from Justice: Police Brutality and Accountability in the United States (1998). Collins was author of Shielded from Justice. During a year-and-a-half to two-year period Collins visited the cities reported on in Shielded from Justice and examined documents from those cities as well as corresponded with and interviewed police officials, city officials, and justice department officials. Atlanta was one of the cities investigated by Collins.

Plaintiffs do not contend Collins is an expert witness. Further, although Collins was identified as a witness prior to the beginning of the trial in March 1999, she has not been qualified as an expert witness pursuant to Fed. R. Civ. P. 26(a)(2). Plaintiffs have failed to show that Collins has any first-hand knowledge of any matters relevant to this case. Collins' report, Shielded from Justice, was not produced by a governmental agency and is, therefore, not admissible without proof of its trustworthiness. Neither Collins' testimony nor her report are admissible.

In the September 14, 1999 Order, the Court noted that Chief Harvard, Sgt. Dawkins, and the City were aware of Officer Wingo's disciplinary record and identified seven relevant claims in that record. All of the claims were investigated by the police Office of Professional Standards. Five of the claims alleged physical violence, one alleged rudeness, and one alleged verbal abuse. Of the five alleging physical violence, one (from September 1990) was sustained and the related lawsuit settled, one was settled but alleged excessive force by several Atlanta police officers in addition to Officer Wingo, and three were "not sustained". One of those "not sustained" occurred in April 1995, after the incident at issue here. As stated in the September 14, 1999 Order, "not sustained" means "evidence was insufficient to prove or disprove the allegations stated in the complaint." In none of the seven claims was Officer Wingo exonerated. Nor were any of the claims "unfounded." Three of the complaints were investigated by Sgt. Dawkins: the complaint alleging rudeness, the complaint alleging verbal abuse, and the April 1995 complaint alleging physical violence. Because the complaints were "not sustained," they are insufficient to put Chief Harvard, Sgt. Dawkins, and the City on notice of Officer Wingo's alleged tendency to use excessive force.

The investigative reports of several of the "not sustained" instances suggest that the police witnesses supported Officer Wingo's testimony whereas the non-police witnesses supported the testimony of the complainant or that witnesses on behalf of the complainant could not be found. Nesbitt testified that when he filed a complaint with the City, he offered to provide names of witnesses, the person taking the information declined to take the names telling him

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that they would want to know the names later in the investigation, and that no one ever contacted him for the names of witnesses.

Without the testimony of Collins, there is insufficient evidence from which a jury could conclude that the City had a policy, custom, or practice of not thoroughly investigating citizen complaints. Without evidence of a policy, custom, or practice of not thoroughly investigating citizen complaints, there is insufficient evidence from which a jury could conclude that chief Harvard, Sgt. Dawkins, and the City should have known of Officer Wingo's alleged tendency to use excessive force. Chief Harvard, Sgt. Dawkins, and the City of Atlanta are entitled to summary judgment on the claims against them for the use of excessive force.

## CONCLUSION

For the reasons stated herein, Defendants' motion for reconsideration is GRANTED [Civil Action No. 1:96-CV-151-CAM, Docket No. 69-1]; Defendants' motion to strike the report and deposition testimony of Collins is DENIED [Civil Action No. 1:96-CV-151-CAM, Docket No. 66-1]; and Defendants' motion for summary judgment as to the Plaintiffs' claims against Chief Harvard, Sgt. Dawkins, and the City of Atlanta for the use of excessive force is GRANTED [Civil Action No. 1:96-CV-1038-CAM, Docket No. 62-1; Civil Action No. 1:96-CV-151-CAM, Docket No. 57-1]. The amended pre-trial order is due thirty (30) days from the date of this order.

Pursuant to Fed. R. Civ. P. 54(b), Clerk of Court is directed to enter final judgment in favor of Chief Harvard, Sgt. Dawkins, and the City of Atlanta.

SO ORDERED, this ____ day of November, 1999.

/s/ Charles A. Moye, Jr.
UNITED STATES DISTRICT JUDGE
CHARLES A. MOYE, JR.

CAM:J

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAR 22 2001
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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NO. 99-15000-FF

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JIMMY SCOTT BAGLEY,

Plaintiff-Appellant,

versus

J. G. WINGO,
BEVELRY HARVARD, as Chief of
Police of the City of Atlanta,
Georgia, et al.,

Defendants-Appellees.

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On Appeal from the United States District Court for the
Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, _____ F.2d____)

Before: CARNES and BARKETT, Circuit Judges, and POLLAK[1], District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

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1. Honorable Louis H. Pollack, U.S. District Judge for the Eastern District of Pennsylvania, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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NO. 99-15000-FF

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JIMMY SCOTT BAGLEY,

Plaintiff-Appellant,

versus

J. G. WINGO,
BEVELRY HARVARD, as Chief of
Police of the City of Atlanta,
Georgia, et al.,

Defendants-Appellees.

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On Appeal from the United States District Court for the
Northern District of Georgia

---

BEFORE: CARNES, and BARKETT, Circuit Judges, and POLLAK[1], District Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

/s/ Rosemary Barkett

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1.Honorable Louis H. Pollack, U.S. District Judge for the Eastern District of Pennsylvania, sitting by designation

42 USCA § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 USCA § 1343

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section--

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just
compensation.

United States Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in

Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.